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No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MONONGAHELA POWER COMPANY,
Petitioner,

v.

CHARLES R. MILLER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this case respondent obtained an approximate $1 million award of compensatory damages against petitioner resulting from an accident for which respondent himself and his employer, one of petitioner's industrial customers, were substantially at fault. Under West Virginia's bizarre system of comparative negligence, coupled with joint and several liability, and immunity for workers' compensation employers from third-party contribution claims, petitioner was saddled with more than its proportionate share of the damages, without any recourse against the employer and without any credit for respondent's receipt of workers' compensation benefits. The first question presented is whether—as other state courts of last resort have held—such a system of tort liability is arbitrary and irrational, in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

2. In addition to his award of compensatory damages, respondent obtained a post-trial award of prejudgment interest in the approximate amount of $1 million. The second question presented is whether that award of prejudgment interest, an item of relief never claimed by respondent during eight years of litigation, until after the verdict was returned and judgment entered, violated petitioner's fundamental due process right to notice of the claims it was required to defend.

LIST OF PARTIES AND RULE 29.1 LIST

The parties in the Supreme Court of Appeals of West Virginia are those parties listed in the caption of this Petition. Because of the potential applicability of 28 U.S.C. § 2403(b) to this Petition, copies have been served upon the Attorney General of West Virginia. Supreme Court Rule 29.4(c).

Petitioner Monongahela Power Company is a wholly-owned subsidiary of Allegheny Power System, Inc. Monongahela Power Company has two subsidiaries that are not wholly owned by it: Allegheny Generating Company and Allegheny Pittsburgh Coal Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monongahela Power Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia, entered in this matter on February 7, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 403 S.E.2d 406, and is reprinted in Appendix A, at 1a-19a. The Judgment Order of the Circuit Court for Hancock County, West Virginia, incorporating the jury's verdict, was entered on June 26, 1989, and is reprinted in Appendix C, at 22a-24a. The Circuit

Court denied petitioner's motions for a new trial and judgment notwithstanding the verdict in an Order entered on August 22, 1989, reprinted in Appendix D, at 25a-26a. On October 25, 1989, the Circuit Court granted respondent's motion to enter a revised judgment containing prejudgment interest on the entire amount of the original judgment, running from the date of respondent's accident to the date of the jury's verdict, in a "Judgment Order Nunc Pro Tunc" reprinted in Appendix E, at 27a-28a.

On April 24, 1991, the Supreme Court of Appeals of West Virginia denied petitioner's timely petition for rehearing of its Opinion and Judgment. That Order is reprinted in Appendix F, at 29a.

JURISDICTION

The Judgment of the Supreme Court of Appeals of West Virginia was entered on February 7, 1991. Appendix B, at 20a-21a. That Court denied a timely petition for rehearing in an Order entered on April 24, 1991. Appendix F, at 29a. This Petition is filed within ninety days of the entry of that Order, and is timely pursuant to Supreme Court Rule 13.4.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" The Equal Protection Clause of the Fourteenth Amendment provides in pertinent part: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

The provision of the West Virginia Workers Compensation Act, which has been read to immunize contributing employers from liability, not only to their injured employees, but also to claims for contribution filed by third parties who are sued by those employees, is West Virginia Code § 23-2-6. That provision is reprinted verbatim in Appendix G, at 30a.

The West Virginia statute governing prejudgment interest on damage awards is West Virginia Code § 56-6-31. It is reprinted verbatim in Appendix H, at 31a.

STATEMENT OF THE CASE

Petitioner Monongahela Power Company is a West Virginia electric utility which provides service to residential, commercial and industrial customers located in portions of West Virginia and Ohio. Among its industrial customers is the Homer Laughlin China Company, with a plant located in Hancock County, West Virginia. In 1970 Homer Laughlin granted petitioner an easement for the construction of a substation which would supply the Homer Laughlin plant with its energy requirements. App. A, at 2a.

The Monongahela Power substation located at the Homer Laughlin plant had the capacity to convert incoming electric current, at up to 25,000 volts, to 2400 volt current. Homer Laughlin itself maintained seven additional substations located throughout its property that converted the 2400 volt electric current to the substantially lower voltages actually used in the plant. App. A, at 3a. The Monongahela Power substation consisted of three transformers surrounded by a padlocked chain link fence. Petitioner posted signs on the fence that read "DANGER—KEEP AWAY." Homer Laughlin's employees did not have access to petitioner's substation; only Monongahela Power had keys to the padlock. App. A, at 3a-4a.

Respondent Charles R. Miller was hired by Homer Laughlin in September, 1978 as an electrician. On February 16, 1979 respondent's supervisor directed him to use an amp probe or ammeter to check the voltage on the "low" or "outgoing" side of a transformer located in Homer Laughlin's No. 5 substation. Respondent never before had performed this task, and did not know where the No. 5 substation was located. Respondent and a co-worker mistakenly proceeded to the Monongahela Power substation, instead of Homer Laughlin's substation, and attempted to gain entry. The key they were told to use did not open petitioner's padlock. Respondent returned to his supervisor for further instructions. The Homer Laughlin supervisor then directed respondent to try two additional keys, and if they did not turn the lock, to cut it off with bolt cutters. Respondent and his co-worker returned to petitioner's substation and eventually cut off the padlock to gain entry.

Respondent next inexplicably climbed up on the transformer's "high" side and came into contact with the incoming line, which was then energized to 14,400 volts. Respondent received a severe electrical shock and burns to his right arm. He was thrown 12 to 15 feet to the ground. Respondent's arm eventually had to be amputated. *See* App. A, at 3a-4a.

Nearly two years after his accident, and after being awarded substantial workers' compensation benefits, plaintiff filed suit against both Monongahela Power and his employer, Homer Laughlin. The Complaint sought compensatory damages in the amount of $2 million, but did not seek prejudgment interest. Respondent alleged that petitioner had been negligent in designing and constructing its substation by failing to provide adequate warning signs that clearly identified the substation as petitioner's property, and thus prevent inadvertent entry by a misguided Homer Laughlin employee. App. A, at 4a.

Petitioner moved for summary judgment in February, 1982, asserting that respondent's evidence of its negligence was insufficient to present an issue for trial. The Circuit Court denied that Motion in March, 1984 and set the case for trial in July of that year. That trial date was continued by the Circuit Court because of a conflict in the Court's calendar, and the case then languished for several years. Meanwhile, Homer Laughlin moved for summary judgment based on the statutory immunity created by the West Virginia Workers Compensation Act, W. Va. Code § 23-2-6. On January 5, 1988, with the consent of respondent, the Circuit Court dismissed the Complaint against Homer Laughlin with prejudice. The remaining claims against petitioner were finally set for trial on June 19, 1989, more than eight years after the Complaint was filed and more than ten years after respondent's accident.

The Circuit Court ruled prior to trial that respondent could not proceed against petitioner on a strict liability theory. Respondent's claim at trial, premised on a simple negligence theory, was that petitioner had "induced" him to enter into its fenced and padlocked substation by failing adequately to identify the substation as Monongahela Power property. The Circuit Court rejected petitioner's argument that respondent was a trespasser as a matter of law, who needed to prove wilful or wanton acts by the power company contributing to his injuries. *See* App. A, at 5a.

Immediately prior to trial, the Circuit Court granted respondent's motion in limine prohibiting petitioner from offering evidence or argument at trial concerning Homer Laughlin's responsibility for causing this accident. The Circuit Court reiterated that ruling in its instructions to the jury. The Court charged the jury not to consider the possible fault of Homer Laughlin or any other party as a factor in their deliberations. App. A, at 5a.

West Virginia is a comparative negligence state. On June 23, 1989, the jury returned a special verdict, which found that petitioner was guilty of negligence proximately causing respondent's injuries; that respondent also was guilty of negligence; that petitioner was responsible for 90% of the total negligence contributing to the accident; and that respondent's compensatory damages amounted to $1,200,000. Based on that verdict, the Circuit Court entered a Judgment in favor of respondent in the amount of $1,080,000 (reducing the verdict by 10% to account for respondent's negligence), with post-judgment interest to run at the statutory rate of 10%. *See* App. C, at 22a-24a. The Circuit Court's Judgment did not include an award of prejudgment interest; this was not surprising inasmuch as respondent never had sought prejudgment interest as an element of his claim for relief. *See* App. A, at 5a.

Petitioner filed a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. One of the grounds raised in that motion was the refusal of the Circuit Court to permit petitioner "to argue that the negligence of the Homer Laughlin China Company through its agents, servants and employees . . . proximately caused the injury to the plaintiff." Record, 247. The Circuit Court denied this Motion on August 22, 1989, but granted petitioner's motion for a stay of execution pending appeal to the West Virginia Supreme Court of Appeals. App. D, at 25a-26a.

On September 1, 1989, respondent filed a Motion in the Circuit Court, seeking to revise that Court's Judgment to include prejudgment interest on the entire amount of the judgment from the date of respondent's accident, February 16, 1979, to the date of the jury's verdict, June 23, 1989. As calculated by respondent's counsel, at the statutory rate of 10%, such an award of prejudgment interest amounted to $1,116,720, an award that would more than double respondent's recovery. *See*

App. A, at 5a-6a. Petitioner opposed respondent's motion, arguing that respondent had waived any claim for prejudgment interest by failing to seek it in his complaint, or in the jury instructions he submitted to the Circuit Court, or in the Judgment Order that his counsel had prepared and that the Court had entered on June 26, 1989. Record, 304-310. Petitioner also argued that the motion to amend the judgment was untimely under the West Virginia Rules of Procedure; that a 1981 amendment to the West Virginia Code permitting prejudgment interest to be awarded on special damages in personal injury actions should not be retroactively applied to an accident predating that amendment; and that an award of prejudgment interest under the circumstances of this case would violate petitioner's "right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution since [petitioner] did not have notice of [respondent's] intent to seek prejudgment interest." Record, 309.

On October 25, 1989, the Circuit Court, without opinion, entered the "Judgment Order Nunc Pro Tunc" which had been submitted by respondent's counsel, and which included prejudgment interest totalling $1,116,720. App. E, at 27a-28a. Petitioner then filed its Petition for Appeal to the Supreme Court of Appeals of West Virginia, which was granted on May 3, 1990.

The Supreme Court of Appeals affirmed all aspects of the Judgment of the Circuit Court, except with respect to the calculation of prejudgment interest, which it reduced by approximately $260,000. The Supreme Court of Appeals first rejected petitioner's argument that the Circuit Court had erred in allowing this case to be presented to a jury at all in light of the fact that respondent was a "trespasser" who had gained entry to petitioner's substation by cutting a padlock. The Supreme Court of Appeals held that a power company owes an "extraordinarily high duty of care . . . to every member of the general public," and that the jury in this case

"could reasonably have inferred that had [petitioner] clearly and unequivocally identified its substation as the property of the power company, the [respondent] would not have cut the lock and entered upon the property." App. A, at 10a. At least for power companies, the Court was willing to equate a failure to identify the padlocked substation as Monongahela Power's property with a failure "to avoid wilful and deliberate injury . . . ." *Id.*

The Court next turned to petitioner's contention that the Circuit Court clearly had erred in withholding from the jury evidence and argument concerning Homer Laughlin's negligence as a factor contributing to respondent's injuries. The Supreme Court of Appeals agreed that under its previous decisions defining the application of comparative negligence principles, the Circuit Court should have instructed the jury to consider the negligence of all parties who had contributed to the accident, not just those parties named as defendants in the litigation. *See* App. A, at 12a, citing *Bowman* v. *Barnes*, 168 W. Va. 111, 282 S.E.2d 613 (1981). But the Court ruled that the Circuit Court's error was harmless because even if the jury had determined Monongahela Power's negligence to be only 1% responsible for respondent's accident, respondent would have been free nonetheless, under the doctrine of joint and several liability, to collect all of his damages from petitioner. App. A, at 11a.

Petitioner had anticipated a possible harmless error ruling by the Supreme Court of Appeals,[1] and thus had

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[1] Petitioner also argued that this error was not harmless, because a properly instructed jury might have decided that respondent was 10% responsible for his accident, Homer Laughlin and its supervisor were 90% responsible, and Monongahela Power was not responsible for the accident at all. The Supreme Court of Appeals pooh-poohed this argument, stating that "we know from experience that juries are not stupid." App. A, at 11a. "We cannot imagine that if the jury concluded that Monongahela was 90 percent negligent under circumstances where Monongahela was prohibited from arguing the exclusive fault of Homer Laughlin, the jury would

argued that the West Virginia system of tort liability, upon which such a ruling might be premised, violated petitioner's federal constitutional rights to due process and equal protection. As correctly described by the Supreme Court of Appeals, petitioner argued "that the combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and (3) West Virginia's statutory workers' compensation immunity violates federal due process and equal protection principles." App. A, at 13a. To illustrate the argument, petitioner (and the Supreme Court of Appeals in its opinion) posited a situation in which a properly instructed jury in this case found the respondent negligent and 10% responsible for his own injuries; a third-party tortfeasor, such as petitioner, 1% at fault; and the respondent's employer—who is shielded from liability by statutory immunity—89% at fault. Under West Virginia comparative negligence law, the respondent's damages would be reduced by 10% to account for his own negligence, but under principles of joint and several liability he would then be free to collect the remaining 90% of his damages from the 1% negligent third party. Moreover, that third party would be prohibited by workers' compensation immunity from suing the 89% negligent employer for contribution.

The West Virginia Supreme Court of Appeals described petitioner's constitutional arguments as "ingenious" and "spectacularly good," and seemed to acquiesce in petitioner's argument that the state's injury compensation system is "morally outrageous." *See* App. A, at 13a-14a. Nonetheless, the Court held that acceptance of petitioner's argument would "require us to turn one hundred years of gradually evolving tort law on its head," which it refused to do absent "clear, bright line

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not have found Monongahela at least one percent negligent if Monongahela had been allowed to point the finger at Homer Laughlin all during trial." *Id.* at 11a-12a.

rules of national application . . . articulated by the Supreme Court of the United States . . . ." *Id.* at 14a-15a. Unwilling to anticipate this Court's rulings on the subject, and unmoved by "the novelty, ingenuity and even logic of Monongahela's argument," the Supreme Court of Appeals "decline[d] to rewrite the entire tort law of West Virginia in one fell swoop based on supposed federal principles without explicit federal direction." *Id.* at 15a.

Turning to the Circuit Court's award of prejudgment interest,[2] the Supreme Court of Appeals noted that respondent's counsel had conceded at oral argument that the trial court had erred by awarding interest on interest, and by using a constant rate of interest of 10% when the statutory rate had been 6% during part of the prejudgment period. *See* App. A, at 16a-17a. The Supreme Court thus directed the parties to enter into a stipulation that could be used by the Court to correct these errors. *Id.* at 17a-18a. The Supreme Court of Appeals also expressly rejected petitioner's argument that respondent's post-trial motion seeking the addition of prejudgment interest was untimely under the West Virginia Rules of Procedure. *Id.* at 16a, n.5. But the Court did not address petitioner's additional argument that the belated award of prejudgment interest in this case violated its federal constitutional right to due process of law—even though that issue had been raised in the Circuit Court, and had been fully briefed and argued. *See* Brief of Appellant, at 38-41; Reply Brief of Appellant, at 36-37.

Following the Supreme Court of Appeals' decision, Monongahela Power timely filed a Petition for Rehearing. That petition reiterated petitioner's federal due process

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[2] The Supreme Court of Appeals also rejected petitioner's argument that the Circuit Court had erred in permitting respondent to introduce and argue from certain photographic exhibits, an issue of state law not germane to this Petition. *See* App. A, at 15a-16a.

challenge to the award of prejudgment interest, based on the retroactive application of the 1981 amendment to § 56-6-31 of the West Virginia Code, and the fact that respondent never sought an award of prejudgment interest until two months after the jury's verdict had been returned and judgment entered. The Supreme Court of Appeals denied the Petition for Rehearing, without explanation, in an Order entered on April 24, 1991. *See* App. F.[3]

REASONS FOR GRANTING THE WRIT

I. WEST VIRGINIA'S SYSTEM OF TORT LIABILITY FOR COMPENSATING INJURED WORKERS VIOLATES FEDERAL DUE PROCESS AND EQUAL PROTECTION PRINCIPLES

The leading commentator in the field has described the issue whether or not third-party tortfeasors should be afforded some sort of contribution remedy against a negligent employer as "[p]erhaps the most evenly-balanced controversy in all of workers' compensation law." Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 484, *quoted in Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193 n.3 (1983); *ibid.*, 460 U.S. at 199 (Rehnquist, J., dissenting). West Virginia, through the decisions of its Supreme Court of Appeals, has resolved that issue in the most unbalanced fashion imaginable. In so doing, the West Virginia Court has transgressed "the constitutional minimum of 'fundamental fairness,'" by which this Court may judge state court standards for the determination of one party's liability for another's injuries. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745, 756 n.8 (1982).[4] Moreover, the decision of the West Virginia

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[3] Subsequent to that Order, on April 29, 1991, the Supreme Court of Appeals granted petitioner a stay of execution premised on the timely filing of a petition for writ of certiorari to this Court.

[4] In *Martinez* v. *California*, 444 U.S. 277, 282 (1980), this Court afforded broad deference to the states' interests in fashioning their

Supreme Court of Appeals in this case is in direct conflict with decisions of several other state courts of last resort which have held similar aspects of their own systems of tort liability to violate federal constitutional guarantees of due process and equal protection. *See* pages 15 to 19 *infra*.

As frankly conceded in the opinion below, the West Virginia Supreme Court of Appeals has adopted a system of comparative negligence, but has retained the doctrine of joint and several liability. App. A, at 14a. Thus, in a case in which an injured employee sues a third party for his injuries, he is entitled to recover all of his damages from that third party, even if a jury has determined that the employer is more responsible for the accident than the third party, and even if the plaintiff-employee is more responsible for the accident than the third party, so long as the combined negligence of the employer and the third-party defendant exceeds that of the plaintiff-employee. *Ibid.*

What the Court below did not make explicit in its opinion is that, under West Virginia law, the third-party defendant in the tort action also is absolutely precluded from suing the negligent employer for contribution, even if the employer's negligence, rather than that of the third party, was primarily responsible for the plaintiff's injuries. *See Riggle* v. *Allied Chemical Corp.*, —— W. Va. ——, 378 S.E.2d 282, 285 n.7 (1989). The West Virginia Supreme Court of Appeals consistently has read the statutory immunity afforded to employers under the

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own rules of tort law, but recognized that that interest may not be paramount to the federal constitutional interest "in protecting the individual citizen from state action that is wholly arbitrary or irrational." *See also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 781 (E.D.N.Y. 1984) ("the law believes it unfair to require an individual to pay for another's tragedy unless it is shown it is more likely than not that he caused it").

Workers Compensation Act, W. Va. Code § 23-2-6, as precluding actions for contribution by third parties, even though that result was not ordained expressly by the legislature. *See Sydenstricker* v. *Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511, 516-17 (1982). *See also Miller* v. *Gibson*, —— W. Va. ——, 355 S.E.2d 28, 31-32 (1987) (holding that an employer may be held liable for contribution only if he is guilty of willful, wanton and reckless misconduct proximately causing the employee's injuries or death).[5]

Thus, if a properly instructed jury in this case had ruled, as the Supreme Court of Appeals postulated, that Homer Laughlin was 89% responsible for this accident, and petitioner's negligence contributed to the extent of a mere 1%, respondent nonetheless would be entitled to a judgment for 90% of his damages against petitioner, would be entitled to collect that judgment from petitioner, without reduction, and petitioner would have no

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[5] W. Va. Code § 23-2-6, reprinted in App. G, simply states that an employer who is in good standing under the Workers Compensation Act "shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring . . . ." Another provision of the Workers Compensation Act, W. Va. Code § 23-4-2, permits an employee to sue his employer for damages in excess of workers' compensation benefits, if his injury or death results from the "deliberate intention" of the employer to injure him. In *Miller* v. *Gibson, supra*, the Supreme Court of Appeals permitted third parties to make claims for contribution against employers only under circumstances in which an employee could obtain relief in a direct action under § 23-4-2. *See also Sydenstricker, supra*, 288 S.E.2d at 517-19.

In this case, respondent eventually abandoned his initial claim that his injuries were the result of a deliberate act to injure him by Homer Laughlin; petitioner, of course, also was unable to assert in good faith such wilful, wanton or reckless misconduct by the Homer Laughlin supervisor that could rise to the level of a "deliberate intention" to injure. Thus, petitioner will be unable to make a claim for contribution against Homer Laughlin despite its obvious negligence in failing to train and supervise respondent in the performance of the task that led to his tragic accident.

recourse against Homer Laughlin. *See* App. A, at 11a, 14a.

In a final irony of the West Virginia system of tort liability, up until recently it was one of only three states that neither provided for a plaintiff's damages to be reduced by the amount of workers' compensation benefits he receives, *see Jones* v. *Appalachian Electric Power Co.*, 145 W. Va. 478, 115 S.E.2d 129 (1960), nor for the employer to be entitled to subrogation rights with respect to the judgment awarded or settlement obtained in the third party action, *see Jones* v. *Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). *See generally National Fruit Product Co.* v. *Baltimore & Ohio R.R.*, —— W. Va. ——, 329 S.E.2d 125, 127-29 (1985). Thus, the injured worker was entitled to a duplicative recovery of workers' compensation benefits plus any damages awarded by a jury or obtained in a settlement with an alleged third-party tortfeasor. *National Fruit Product, supra*, 329 S.E.2d at 129, n.2.[6]

In this case, the West Virginia Supreme Court of Appeals rejected petitioner's federal constitutional arguments that its system of comparative negligence, coupled with joint and several liability, and employer immunity from claims for contribution, violates due process and equal protection principles. Other state courts of last resort, faced with similar or identical systems of allocating tort liability, have reached conflicting results.

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[6] In legislation that became effective on July 1, 1990, and that applies only to claims arising from injuries after that date, the West Virginia legislature adopted a limited form of subrogation, enabling the employer to recover medical benefits paid under workers' compensation from the proceeds obtained by the employee in the third-party action. The amount to be received by the employer in subrogation, however, may not exceed 50% of the employee's recovery from the third party, net of any attorney's fees and costs. *See* W. Va. Code § 23-2A-1.

For example, in *Carlson* v. *Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974), the Supreme Court of Minnesota was confronted with a provision of that state's workers' compensation law that expressly stated that "the employer shall have no liability to reimburse or hold [a third-party tortfeasor] harmless on such judgments or settlements [obtained by his employee] in absence of a written agreement to do so executed prior to the injury." 215 N.W.2d at 617. The third-party tortfeasor in that case challenged the validity of the provision on federal due process grounds. The Court determined that a legislative decision to extinguish a common law right of contribution or indemnity would survive due process scrutiny if the legislature provided some reasonable substitute for the third party's rights and the legislation was rationally related to a legitimate state objective. 215 N.W.2d at 618. The *Carlson* Court held that the Minnesota legislation failed both tests.

The Court in *Carlson* observed that a third-party tortfeasor gains nothing from the more efficient remedial system created by the workers' compensation statute, and the legislature had provided no reasonable substitute for the abrogation of the third-party's common law right of contribution. Moreover, "[n]o legitimate objective is fostered by preventing indemnification to a third-party tortfeasor from a negligent employer." *Id.* at 619. The Court therefore held that the Minnesota statute affording workers' compensation immunity to employers from third-party contribution claims "violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution . . .," as well as similar provisions of the Minnesota Constitution. *Id.* at 620.[7]

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[7] The result reached in *Carlson* was reaffirmed by the Minnesota Supreme Court in *Lambertson* v. *Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679, 687 (1977). In *Lambertson*, the Court decided that under Minnesota's comparative negligence regime the third-party tortfeasor is entitled to contribution from a negligent employer "in an amount proportional to [the employer's] percentage

The Florida Supreme Court reached the same result as the Minnesota Court in *Carlson*, relying on the Equal Protection Clause of the Fourteenth Amendment. *See Sunspan Engineering & Construction Co.* v. *Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975). In *Sunspan*, the Florida Supreme Court noted that under that state's workers' compensation law both the injured employee and his employer are given the right to sue an alleged third-party tortfeasor, "but unequally and unreciprocally the tort-feasor is precluded from suing in turn in a third party action the employer who may be primarily liable instead of the tort-feasor for the employee's industrial accident." 310 So. 2d at 7. This statutory result causes the third party to "suffer[] the burdens and restrictions of the [Workers Compensation] Act, while the employer receives a windfall . . . ." *Id.*

The Court concluded that the Florida legislature, in eliminating the third party's right of contribution, had created "an arbitrary and capricious innovation without any rational basis furthering any overpowering public necessity," and was therefore contrary to the Florida Constitution. Moreover, the fact that the Act singled out only those alleged tortfeasors who had provided goods or services to employers involved in accidents covered by workers' compensation, was deemed an arbitrary classification in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 8. The Florida Supreme Court recently reaffirmed *Sunspan*, over the dissent of one Justice, in *L.M. Duncan & Sons* v. *City of Clearwater*, 478 So. 2d 816 (Fla. 1985).[8]

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of negligence, but not to exceed [the employer's] total workers' compensation liability to plaintiff." 257 N.W.2d at 689.

[8] In a comparable decision that relied only on state constitutional grounds, the Kentucky Court of Appeals has held that the "exclusive remedy" provision of that state's workers' compensation statute does not insulate an employer from tort liability asserted by way of an action for indemnity by a "passively-negligent" third-party tortfeasor. *Kentucky Utilities Co.* v. *Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969). The Kentucky Court ruled that

In Ohio, the state's intermediate Court of Appeals adopted a different route to reach essentially the same result. In *Couch* v. *Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), the Court determined that a co-employee of an injured worker was protected by workers' compensation immunity from a claim for contribution by a third-party tortfeasor. But the Court reasoned that under the State's system of comparative negligence, the third party should be entitled to a jury determination of the co-workers' percentage of fault, and should be held liable only for his own proportionate share of the total negligence contributing to the injured employee's damages. In reaching this result, the Court observed that "[t]he fact that [the third party otherwise] is obligated to pay more than his proportionate share of liability [to the plaintiff] also violates his right to due process of law and his right to equal protection under the law. It also offends our basic sense of equity and fair play." 497 N.E.2d at 1375.

To be sure, other state and federal courts have rejected constitutional arguments akin to those presented by this Petition.[9] However, there is substantial conflict in the law over the application of federal due process and equal protection principles to this area of a third-party tortfeasor's rights and remedies against a negligent employer. In addition, many state courts that operate under a system of comparative negligence have abrogated or modified the doctrine of joint and several liability so

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any contrary reading of the statute would violate that provision of the Kentucky Constitution which forbids the General Assembly from abolishing pre-existing common law "jural rights."

[9] *See, e.g., Hudson* v. *Union Carbide Corp.*, 620 F. Supp. 558, 564-65 & n.8 (N.D. Ga. 1985) (expressly noting the conflict with *Carlson* and *Sunspan*); *Williams* v. *White Mountain Construction Co.*, 749 P.2d 423 (Colo. 1988); *Raisler* v. *Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas* v. *Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 290 N.W.2d 276 (1980).

that a slightly negligent third party, such as petitioner in this case, is not unfairly saddled with liability for the proportionate fault of the negligent employer who is immunized by a workers' compensation act.[10]

In fact, at least some of the decisions that have rejected federal constitutional challenges to workers' compensation immunity from third-party claims for contribution have done so in express reliance upon the ground that the third party would *not* be subjected to joint and several liability for the employer's proportionate share of the damages. *See, e.g., Williams* v. *White Mountain Construction Co.*, 749 P.2d 423, 428-29 (Colo. 1988) (noting that the third-party tortfeasor is not required to shoulder a disproportionate share of liability because under the Colorado system of comparative negligence, and the legislative abolition of joint and several liability, tortfeasors sued by injured employees are able to present evidence of employer liability at trial and to "reduce whatever damages may be assessed against them to a level proportionate to their [own] liability"); *cf., In re Air Crash Disaster at Stapleton*, 720 F. Supp. 1465, 1466-67 (D. Colo. 1989) (applying similar analysis to constitutional challenge to governmental immunity from third-party contribution claims).

Moreover, in many other comparative negligence states, such as Ohio, discussed *supra*, the legislatures or the courts have required that the immune employer's percentage of negligence be determined by the jury, and the third party's liability to the plaintiff reduced to reflect

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[10] Of the forty-five states that have adopted some form of comparative negligence, either by legislation or judicial decision, eight have abolished the doctrine of joint and several liability. *See* V. Schwartz, *Comparative Negligence* § 16.4 (2d ed. 1986 & 1990 Supp.). At least fourteen other states have limited their application of joint and several liability principles so that the doctrine does not apply to most forms of negligence actions or to non-economic damages. *See* V. Schwartz, *supra*, at pp. 50-51 (1990 Supp.).

only its proportionate share of the total fault, or reduced to reflect the benefits received by the plaintiff from the workers' compensation employer. *See, e.g., Associated Construction & Engineering Co.* v. *Workers' Compensation Appeals Bd.*, 22 Cal.3d 829, 150 Cal. Rptr. 888, 587 P.2d 684 (1978); *Runcorn* v. *Shearer Lumber Products, Inc.*, 107 Idaho 389, 690 P.2d 324, 330-31 (1984); *Scales* v. *St. Louis- San Francisco Ry.*, 2 Kan. App. 2d 491, 582 P.2d 300 (1978); *Bartlett* v. *New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982); *Leonard* v. *Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983); *Bode* v. *Clark Equipment Co.*, 719 P.2d 824 (Okla. 1986); Ariz. Rev. Stat. Ann. § 12-2506(B) (1987); Wash. Rev. Code Ann. § 4.22.070(1) (1986).

Finally, in at least two states, the courts of last resort have held that the immunity afforded to the employer by the workers' compensation statute was not intended by the state legislatures to eliminate a third party's claim for indemnity or contribution. *See Skinner* v. *Reed-Prentice Division*, 70 Ill.2d 1, 374 N.E.2d 437, *cert. denied*, 436 U.S. 946 (1978); *Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 383, 282 N.E.2d 288 (1972).

The opinion of the West Virginia Supreme Court of Appeals in this case erroneously suggested that the acceptance of petitioner's constitutional arguments would require that Court "to turn one hundred years of gradually evolving tort law on its head." App. A, at 14a. In fact, nearly half of the states' legislatures and courts now have recognized that the retention of the doctrine of joint and several liability is itself fundamentally incompatible with a system of comparative negligence. *See* V. Schwartz, *Comparative Negligence* § 16.4 (2d ed. 1986 & 1990 Supp.). In addition, many other states have recognized that to immunize negligent employers from claims for contribution by alleged third-party tortfeasors unfairly shifts the burden of industrial accidents from

those employers to the third parties. Finally, under a comparative negligence system, there is no legitimate reason why a state should not reduce the third party's liability to the employee-plaintiff proportionate to the third party's own percentage of fault, or at least reduce the plaintiff's award of damages commensurate with his receipt of workers' compensation benefits. Either solution would not impinge at all on the employer's statutory immunity from costs in excess of those imposed by the workers' compensation system, and would still preserve the employee's ability to sue third parties for damages in excess of his workers' compensation benefits. States that have acted consonant with these "loss-spreading" concerns of "gradually evolving tort law" principles have taken such steps, and have prevented the fundamental unfairness of saddling a slightly negligent third party, such as petitioner, with the entire damages awarded to an injured employee (who himself may have been more responsible for his injuries), while immunizing his negligent employer from any liability.

When this Court first upheld the constitutionality of workers' compensation legislation, it did so with a caveat: "Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, *without providing a reasonably just substitute.*" *New York Central R.R.* v. *White*, 243 U.S. 188, 201 (1917) (emphasis added). As recently as its decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), this Court reexamined the essential compromise of workers' compensation legislation, whereby "employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue [their employer]." 460 U.S. at 194.[11] What the West Virginia

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[11] In *Lockheed*, this Court held that the exclusive remedy provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), does not bar a third party's indemnity action against the

Supreme Court of Appeals failed to acknowledge in this case is that petitioner, as a third-party tortfeasor, is a stranger to that legislative "*quid pro quo*." In the words of Professor Larson, it is unfair for the workers' compensation scheme "to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain." Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351, 420 (1970).

There are multiple solutions to the overwhelming unfairness of the system devised by the West Virginia legislature and implemented by the Supreme Court of Appeals. The Court or legislature could recognize the continuing vitality of petitioner's right to claim contribution from Homer Laughlin,[12] which the highest courts of Florida and Minnesota have required as a federal constitutional minimum. Or the Court or legislature could require that petitioner be held responsible only for its proportionate share of the fault, which the Ohio courts have held to be required by due process and equal protection principles. Or the Court or legislature could recognize the basic incongruity between the principles of comparative negligence and joint and several liability, as many state courts and legislatures have done. In the absence of any of these remedies, however, the tort system of West Virginia, as

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governmental employer, in the absence of evidence that Congress had intended to disturb settled doctrines of tort law affecting categories of parties who did not themselves benefit from the legislative *quid pro quo*. *See* 460 U.S. at 196-98. *See also Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 601 (1963) (reaching the same result under the Longshoremen's and Harbor Workers' Compensation Act).

[12] The common-law right of one joint tortfeasor to seek contribution from another has been recognized in West Virginia since the formation of the state. *See Haynes* v. *City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544, 548-49 (1977).

presently constituted and as applied in this case, violates principles of "fundamental fairness." [13]

Because state courts of last resort have decided the federal constitutional questions presented by this Petition in ways that conflict with the decision of the West Virginia Supreme Court of Appeals, and because of the importance of the issues raised by the application of federal due process and equal protection principles to the states' methods of affording workers' compensation immunity to third-party claims for contribution, the decision below warrants plenary review by this Court. Petitioner is entitled, as the constitutional minimum guaranteed by the Due Process Clause, to have a jury determine to what extent respondent's accident was attributable to the fault of Homer Laughlin; and to have that determination count for something in any calculation of damages owed to respondent by petitioner. The "harmless error" ruling of the West Virginia Supreme Court of Appeals is premised on a bizarre system of tort liability imposed by that Court on those citizens of the state who are unfortunate enough to be sued for on-the-job injuries suffered by workers who are also the beneficiaries of the state's workers' compensation legislation. The system is arbitrary and irrational, and fails to serve any legitimate legislative objective.

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[13] Professor Paul C. Weiler recently surveyed the possible "alternative relations" of third-party tort liability and workers' compensation immunity for employers, noting the widespread nature of this problem in the modern economy. Weiler, *Workers' Compensation And Product Liability: The Interaction Of A Tort And A Non-Tort Regime*, 50 Ohio St. L.J. 825 (1989). Although Professor Weiler's analysis is grounded more in economic policy than constitutional jurisprudence, his conclusion is telling: "The standard response in most of the states, which effectively insulate even the egregiously culpable employer from any responsibility through a combination of employer subrogation for [workers' compensation] benefits and immunity from any contribution to the third party's tort liability, makes little sense." *Id.* at 854.

II. THE POST-TRIAL AWARD OF PREJUDGMENT INTEREST VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

Prior to a 1981 amendment to West Virginia Code § 56-6-31, awards of prejudgment interest in personal injury cases were discretionary with the jury, and were limited to ascertainable pecuniary losses. *Bond* v. *City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981). And prior to the decision in this case, the West Virginia Supreme Court of Appeals always had held that the 1981 amendment to the statute, subjecting the calculation of prejudgment interest to a determination by the trial court rather than the jury, was not to be applied to causes of action arising prior to the effective date of that amendment. *Kirk* v. *Pineville Mobile Homes, Inc.*, —— W. Va. ——, 310 S.E.2d 210, 212 n.1 (1983).

Thus, in this case, petitioner should have been entitled to rely on respondent's failure to present a claim for prejudgment interest to the jury as a firm indication that any such claim was waived. The Circuit Court nonetheless granted a post-trial motion by respondent to add in excess of $1 million in prejudgment interest to the entire amount of the verdict, and the Supreme Court of Appeals affirmed, based on the application of case law interpreting the 1981 amendment to § 56-6-31. *See* App. A, at 18a (applying to this case the decision in *Grove* v. *Myers*, —— W. Va. ——, 382 S.E.2d 536 (1989), which had interpreted the 1981 amendment to § 56-6-31 to require a defendant to submit a special interrogatory to the jury breaking out special damages from the general verdict, or suffer an award of interest on the entire amount of that verdict).

The Supreme Court of Appeals ignored the unfairness created in this case by the retroactive application of the 1981 amendment to § 56-6-31, and its interpretive decision in *Grove* v. *Myers*, particularly when petitioner had no notice from the filing of respondent's complaint in 1981

to the entry of the Circuit Court's Judgment in June, 1989 that respondent was seeking prejudgment interest in any form.

Several federal courts of appeals have ruled, under similar circumstances, that principles of due process prevent a plaintiff from not affording the defendant fair notice of the relief he is seeking. *See, e.g., Atlantic Purchasers, Inc.* v. *Aircraft Sales, Inc.*, 705 F.2d 712, 717 (4th Cir.), *cert. denied*, 464 U.S. 848 (1983). *See also Cianbro Corp.* v. *Curran-Lavoie, Inc.*, 814 F.2d 7, 14 (1st Cir. 1987) (plaintiff not entitled to interest and costs of collecting a note where his complaint failed to provide notice of these claims).

In *Atlantic Purchasers*, the plaintiff was prevented from seeking a treble damages remedy to which it was otherwise entitled when it first notified the defendant of that request for relief in a post-trial motion filed pursuant to Rule 54(c) of the Federal Rules of Civil Procedure. The Court observed that "[o]ne of the primary purposes of the modern systems of civil procedure, a purpose which has its roots in notions of fundamental fairness and due process, is to prevent the use of surprise and procedural ambush and so enable all litigants to make the *same* realistic appraisal of the case." 705 F.2d at 717, n.6. And the Court held that "[f]undamental fairness requires . . . where the statutory remedy may increase greatly the defendant's liability, that the opposing party be notified of the possibility of the unusual relief prior to the plaintiff's tender of a proposed judgment on the verdict." *Id.* at 717, citing *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 491 n.9 (1964).[14]

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[14] In this case, of course, petitioner was given no notice of respondent's claim for statutory prejudgment interest until two months *after* the respondent had submitted, and obtained from the Circuit Court, a judgment on the verdict.

Similar results have obtained in other federal decisions. *See Stewart* v. *Furton*, 774 F.2d 706, 710 (6th Cir. 1985) (a plaintiff is entitled to rely on Federal Rule 54(c) to claim relief not sought in the pleadings "only when there is no prejudice to the defendant as a result of the plaintiff's failure to plead . . ."); *United States* v. *Pelzer Realty Co.*, 377 F. Supp. 121, 124 (M.D. Ala. 1974), *aff'd*, 537 F.2d 841 (5th Cir. 1976) (denying a Rule 54(c) motion for an award of damages in a case in which the government had sought only injunctive relief at trial, because of the questionable constitutionality of the Rule on due process grounds "if it were construed to allow a plaintiff to surprise a defendant and obtain relief under a claim the defendant had not been called upon to defend").

In this case, the Supreme Court of Appeals apparently decided that petitioner should have requested a special interrogatory to the jury in order to insure that respondent would be awarded prejudgment interest only on his special damages. App. A, at 18a-19a. Yet petitioner had *no notice* of any such requirement because respondent never had included a claim for prejudgment interest in his pleadings, and because prior decisions of the same Supreme Court of Appeals had indicated that plaintiffs were to seek prejudgment interest *from the jury* in actions based on injuries arising before the 1981 amendment to § 56-6-31. The total absence of fairness inherent in petitioner's lack of notice concerning the prejudgment interest claim, until after the trial was over, was multiplied here by the years of delay in bringing this case to trial, much of which was attributable to the inaction of respondent and his counsel.

Because of the conflict between the decision of the West Virginia Supreme Court of Appeals in this case, and that of several federal courts of appeals confronting similar issues, petitioner asks that this Court also grant plenary review of the due process question posed by respond-

ent's post-trial receipt of approximately $1 million in prejudgment interest.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

WEST VIRGINIA SUPREME COURT OF APPEALS

No. 19640

CHARLES R. MILLER

v.

MONONGAHELA POWER COMPANY

HANCOCK COUNTY
[Filed Feb. 7, 1991]

Affirmed in part, reversed in part, remanded with directions.

Neely, Justice

1. We have consistently recognized and applied the distinctions for liability purposes among trespassers, licensees and invitees.

2. " 'Those who operate and maintain wires charged with dangerous voltage of electricity are required to exercise a degree of care commensurate with the dangers to be reasonably apprehended therefrom; but they are not insurers against all injury therefrom.' Pt. 1, syllabus, *Maggard v. Appalachian Electric Power Co.*, 111 W. Va. 470." Syllabus Point 7, *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967).

3. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from

whoever is able to pay, irrespective of their percentage of fault.

4. "In order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation." Syl. Pt. 3, *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981).

5. The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and, (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles.

6. A trial court is afforded wide discretion in determining the admissibility of photographic evidence.

7. We will not, in every case, refrain from sorting out errors involving prejudgment interest, but when the defendant fails to submit a special jury interrogatory asking the jury to set forth special or liquidated damages, this Court's attention to such errors is entirely a matter of grace and if the subject is deliberately obfuscated by counsel or error is invited, this Court will summarily dismiss the assignment.

Neely, Justice:

In 1970 the Homer Laughlin China Company, located in Hancock County, West Virginia granted a perpetual easement to Monongahela Power Company over approximately 3,600 square feet at its plant. The easement entitled Monongahela Power Company to construct a substation to supply Homer Laughlin with electricity. In 1971 Monongahela Power completed construction of the substation and put it in service. The purpose of the substation was to convert 25,000 volt incoming current to 2,400 volt outgoing current that could be used by Homer Laughlin.

Around Homer Laughlin's plant site, however, there were also located seven other substations that belonged to Homer Laughlin. These brick substations housed transformers that were used to convert Monongahela's 2,400 volt power to even lower voltages used in Homer Laughlin's plant itself. These substations carried no signs or other markings identifying them as Homer Laughlin's property, and Monongahela's substation contained no signs or markings identifying it as the power company's property.

The plaintiff in this case, Charles R. Miller, was hired by Homer Laughlin in 1978 as an "electrician." Mr. Miller was given a general orientation tour of the plant but was never instructed by Homer Laughlin concerning the location of its seven substations. At trial, Mr. Miller's supervisor testified that although the supervisor usually gave an orientation tour to new employees in the electrical department during which he would point out the various substations, he did not specifically recall doing so when the plaintiff came to work.

Roughly five months after plaintiff was hired, plaintiff's supervisor instructed him to use an amp probe or ammeter to check the voltage on the "low side" of the transformer located in the Homer Laughlin No. 5 substation—the key to which hung inside one of Homer Laughlin's maintenance buildings. Plaintiff had never before performed this task, had never seen the No. 5 substation, and had never used the equipment needed to perform the test. Instead of going to the Homer Laughlin substation, plaintiff and a co-worker went to Monongahela Power's substation where they attempted to enter. But, as one might expect, the key to Homer Laughlin's substation would not open the padlock on the Monongahela Power substation. At this point, the plaintiff returned to his supervisor for further instruction.

Plaintiff's supervisor told the plaintiff over the telephone to try two other keys in the lock and, if these keys

did not work, to use bolt cutters to remove the lock from the door. The plaintiff and his co-worker returned to the wrong substation (Monongahela's) unsuccessfully tried the additional keys, and then cut the padlock on the fence's gate in order to enter. Unlike the substation operated by Homer Laughlin, the Monongahela Power substation was not housed in a building, but rather was surrounded by a chain link fence which had a warning sign that read: "DANGER—KEEP AWAY." The gate to the fence was locked with Monongahela's padlock to which Homer Laughlin, of course, did not have a key.

Plaintiff had never worked around electricity at voltages higher than those typically found in a private house. Despite having no experience with high voltage electricity, plaintiff nonetheless attempted to climb a metal structure located within the substation. But instead of checking the "low" side of the substation, plaintiff climbed near the "high" side of the substation, which at the time was energized to 14,400 volts. When plaintiff came into contact with the energized line, approximately 12 to 15 feet above the ground, he received a severe electrical shock that ultimately required the amputation of his right arm. Plaintiff then sued both the Monongahela Power Company and his employer, Homer Laughlin.

Plaintiff's complaint against Monongahela Power contained two different theories of liability. First, plaintiff asserted a products liability claim against Monongahela Power alleging defective design and construction of the substation. Second, plaintiff claimed that the substation was:

> "negligently and carelessly designed, manufactured, and installed by the defendant in numerous respects, including, but not limited to the absence of adequate warning signs and indicators to prevent an individual from inadvertently entering said 'substation' and coming into contact with energized portions thereof."

(Complaint, p. 2.)

Ultimately the trial court dismissed Homer Laughlin as a defendant because of employer's immunity under Worker's Compensation and held that plaintiff failed to state a claim for relief against the power company on his products liability theory. The case then went to trial on a simple negligence theory under which the plaintiff was allowed to prove that Monongahela had "induced" him to enter the substation by its failure to post signs identifying the substation as one owned by Monongahela Power.

Trial began on 19 June 1989, at which time the lower court granted the plaintiff's motion *in limine* and prohibited Monongahela from offering evidence or arguments concerning Homer Laughlin's role in causing the accident. The lower court allowed plaintiff and his co-employee to testify, over objection, that they would not have entered Monongahela Power's substation if it had been equipped with an identifying sign. At the conclusion of the trial, the Court instructed the jury, consistent with its ruling on the plaintiff's motion *in limine*, and over objection, that the jury could not consider the possible fault of Homer Laughlin China Company or any other party as a factor in its deliberations.

Thus instructed, the jury returned a verdict in favor of the plaintiff for $1,200,000 for the loss of his arm. The jury apportioned negligence in the amount of 10 percent to the plaintiff and 90 percent to the Power Company. Counsel for the plaintiff prepared a judgment order awarding plaintiff $1,080,000, which the trial court entered on 26 June 1989. That judgment order expressly included an award of postjudgment interest, but did not include any award of prejudgment interest. The Power Company filed a timely motion for judgment notwithstanding the verdict or, in the alternative, for new trial on 5 July 1989. On 22 August 1989, the trial court denied the defendant's motion.

On 1 September 1989, plaintiff served a "Motion for Order Nunc Pro Tunc Pursuant to Rule 60(a)" citing

this Court's decision in *Grove v. Myers*, —— W.Va. ——, 382 S.E.2d 536 (1989), and sought to revise the trial court's judgment order to include an award of prejudgment interest on the entire amount of the verdict in the amount of $1,116,720. This figure represented interest at 10 percent from the date of injury, including even that portion of the verdict representing economic loss as to which interest had already been included in plaintiff's expert's testimony. Plaintiff's counsel candidly admitted to the trial court that the parties had stipulated medical damages and plaintiff's economist had already included prejudgment interest in his testimony. Nonetheless, the trial court, without opinion, entered the form order that had been submitted by plaintiff's counsel with the motion. Defendant then appealed to this Court.

I

Monongahela is outraged because it was held liable notwithstanding that West Virginia recognizes the common law distinctions among trespassers, licensees, and invitees.[1] In Syllabus Point 1 of *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966), we said:

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[1] In *Waddell v. New River Co.*, 141 W. Va. 880, 883-84, 93 S.E.2d 473, 476 (1956), we defined invitee, licensee, and trespasser:

> The plaintiff was either an invitee, licensee or a trespasser. In the law of negligence, and with reference to trespasses on realty, invitation is the act of one who solicits or incites others to enter upon, remain in, or make use of, his property or structures thereon, or who so arranges the property or the means of access to it or transit over it as to induce the reasonable belief that he expects and intends that others shall come upon it or pass over it. To constitute a person or [*sic*] licensee upon the premises or property of another, it must be shown that he is there by permission or authority of the owner or his authorized agent. The permission and authority amounting to a license must be expressly or impliedly granted, and mere sufference or failure to object to such person's presence upon the property of another is insufficient within itself to constitute a license, unless under the circumstances that permission should be in-

> "A person is an invitee when for purposes connected with the business conducted on the premises he enters or uses a place of business." Point 1 Syllabus, *Burdette v. Burdette*, 147 W.Va. 313 [127 S.E.2d 249].

In Syllabus Point 2, we said:

> "The owner or the occupant of premises owes to an invited person the duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition." Point 2 Syllabus, *Burdette v. Burdette*, 147 W.Va. 313 [127 S.E.2d 249].

Licensees, however, are owed a much lower duty of care. In the syllabus of *Hamilton v. Brown*, 157 W. Va. 910, 207 S.E.2d 923 (1974), we said:

> Mere permissive use of the premises, by express or implied authority ordinarily creates only a license, and as to a licensee, the law does not impose upon the owner of the property an obligation to provide against dangers which arise out of the existing condition of the premises inasmuch as the licensee goes upon the premises subject to all the dangers attending such conditions.

And, ordinarily, with regard to a trespasser, a possessor of property only need refrain from wilful or wanton injury. *Buckley v. Valley Camp Coal Co.*, 324 F.2d 244 (4th Cir. 1963) (applying West Virginia law). We have consistently recognized and applied the distinctions for liability purposes among trespassers, licensees and invitees.

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ferred. A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.

For an early discussion of the distinctions among invitees, licensees and trespassers, and the duty owed them by landowners, see *Woolwine's Adm'r v. Chesapeake & Ohio Ry. Co.*, 36 W. Va. 329, 15 S.E. 81 (1892).

In the case before us, it is undisputed that Monongahela Power Company had not given plaintiff or Homer Laughlin permission for plaintiff to enter upon Monongahela's substation or climb on its structures. And, it is undisputed that plaintiff did not enter the substation in furtherance of any interest of Monongahela Power. Consequently, Monongahela argues, the lower court erred in failing to find, *as a matter of law*, that plaintiff was a trespasser and entitled to no relief.

With regard to ordinary possessors of land, we enthusiastically reaffirm the common law distinctions among trespassers, licensees and invitees. Nonetheless, in a consistent line of cases stretching back over nearly a century, we have held that electricity is an inherently dangerous instrumentality and that its management requires a peculiarly high level of care. In this regard, although we have never gone so far as to make electric companies insurers, we have come reasonably close by making it clear that any deviation from the highest possible standard of care is sufficient to impose liability. In Syllabus Point 7 of *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 150 S.E.2d 98 (1967), we reaffirmed the rule of *Maggard v. Appalachian Electric Power Co.*, 111 W. Va. 470, 163 S.E. 27 (1932), that:

> "Those who operate and maintain wires charged with dangerous voltage of electricity are required to exercise a degree of care commensurate with the dangers to be reasonably apprehended therefrom; but they are not insurers against all injury therefrom." Pt. 1, syllabus, *Maggard v. Appalachian Electric Power Co.*, 111 W. Va. 470.

Sutton, supra, Syllabus Point 6. In Syllabus Point 1 of *Gault v. Monongahela Power Co.*, 159 W. Va. 318, 223 S.E.2d 421 (1976), we said essentially the same thing:

> An electric company which operates and maintains wires charged with dangerous voltage of electricity,

> though not insurers against all injury caused thereby, is required to exercise a degree of care, commensurate with the dangers reasonably foreseeable.

In Syllabus Point 3, *Lancaster v. Potomac Edison Co.*, 156 W. Va. 218, 192 S.E.2d 234 (1972), we stated, more specifically:

> "A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure or curiosity and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precaution for their safety by insulation of the wire or other adequate means." Point 2 Syllabus, *Love v. Virginian Power Co.*, 86 W.Va. 393.

In the case before us, not only did the plaintiff demonstrate to the jury that the power company had no markings clearly identifying the substation as the property of the power company, but he also presented evidence from the defendant's own employee that the power company deliberately *refused* to use signs advertising power company ownership. In this regard, Mr. Cady, the distribution engineer for Monongahela, testified:

> "We have always felt, over the years, at least the 27 years that I have been there, and I think our experice [sic] has proved that we're better off not to say whose station it is. That leaves doubt in the minds of somebody who wants to go in there for some sort of purpose other than a qualified individual, maybe this isn't the right place. So, it's just been our policy not to do it."

(Rec. p. 745.) The plaintiff then introduced evidence of industry and OSHA standards concerning the size and content of appropriate warning signs. At the conclusion of trial, the jury were even instructed that if the accident

was one that could not reasonably have been anticipated, the defendant could not be held liable.

We find that the plaintiff established a *prima facie* case of negligence because of the extraordinarily high duty of care owed by a power company to every member of the general public. We believe that the jury could reasonably have inferred that had the power company clearly and unequivocally identified its substation as the property of the power company, the plaintiff would not have cut the lock and entered upon the property. Indeed, cases in this state are legion where unsuspecting victims have come in contact with power company lines. *See, Gault, supra; Lancaster, supra; Love v. Virginian Power Co.*, 86 W. Va. 393, 103 S.E. 352 (1920); *Sutton, supra.* In each and every case the power lines were in place pursuant to a valid easement and the very act of coming in contact with them constituted a technical trespass. Therefore, we are doing no violence to our ancient and salutary common law rule that a possessor of property owes no duty to trespassers other than to avoid wilful and deliberate injury; in the power company cases, the extraordinarily high standard of care required to protect the public has always involved taking appropriate measures to keep the public away from high voltage.

Furthermore, in the case before us we have a danger that is eminently foreseeable. The power company knew the layout of Homer Laughlin's plant and understood that: (1) Homer Laughlin used substantial electricity that needed to be converted from higher voltages to lower voltages; (2) Homer Laughlin had its own power substations, albeit designed differently from Monongahela's; and (3) Monongahela's substation was entirely surrounded by Homer Laughlin's property and could reasonably be confused with the rest of Homer Laughlin's plant. Indeed, Monongahela Power's own employee testified that the Power Company *intentionally induced confusion about ownership* to discourage vandals and others who for some reason might wish to trespass on Monongahela's property.

II

The defendant's second assignment of error is that the lower court should not have withheld from the jury the issue of Homer Laughlin's negligence. Although we believe that the trial court erred in ruling that the defendant could not argue the fault of Homer Laughlin, we find that under the facts of this case the error was harmless. The jury clearly found Monongahela to be at fault. The jury found the plaintiff 10 percent at fault and Monongahela 90 percent at fault; however, under joint and several liability, it makes no difference whether Monongahela was 90 percent at fault or 1 percent at fault as long as the plaintiff was not more than 50 percent at fault. *King v. Kayak Mfg. Corp.*, —— W.Va. ——, 387 S.E.2d 511 (1989). In this jurisdiction "[a] plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault." *King*, —— W.Va. at ——, 387 S.E.2d at 515 n.8; *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 SE. 2d 679 (1982).

In the case before us we find that the trial court allowed all of the facts and circumstances surrounding the accident to be introduced into evidence. Although the court erred by not allowing Monongahela to point the finger at Homer Laughlin and argue to the jury that the exclusive cause of the accident was the combined negligence of the plaintiff and Homer Laughlin, nonetheless we know from experience that juries are not stupid. The court's Interrogatory No. 1 asked the jury:

> "Do you find that defendant Monongahela Power Company was guilty of negligence which was the proximate cause of the plaintiff's injuries?"

To this question the jury answered "yes." We cannot imagine that if the jury concluded that Monongahela was 90 percent negligent under circumstances where Monon-

gahela was prohibited from arguing the exclusive fault of Homer Laughlin, the jury would not have found Monongahela at least one percent negligent if Monongahela had been allowed to point the finger at Homer Laughlin all during trial. If the jury had found only a *de minimis* degree of negligence on Monongahela's part, the error would have been reversible, but in this case the question was not even close.

Along the same lines, Monongahela next argues that the lower court's ruling and instructions confound our explicit directive in *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981) concerning the role of an absent party in a comparative negligence case. Monongahela points out that we held in *Bowman* that "in order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence . . . it *must* be ascertained in relation to *all of the parties whose negligence contributed to the accident*, and not merely those defendants involved in the litigation." *Id.*, Syllabus Point 3, in part (emphasis added in appellant's argument).

However, in *Bowman*, we also said:

> "Undoubtedly, there may be situations where the absent party cannot be brought into the suit . . . because the party . . . has the benefit of some immunity, such as . . . the employer's defense of workmen's compensation. In these situations, it would appear to be unfair to preclude a consideration of the plaintiff's contributory negligence in regard to this absent party. To parallel the *Haynes*' rationale, the plaintiff should not be able to diminish his own contributory negligence by the inability to bring a particular party into the action."

Indeed, in the case before us the defendant was allowed to show *all* of the circumstances surrounding the accident and to argue to its heart's content the *plaintiff's own* contributory negligence. There is no way that the

defendant could have augmented the plaintiff's contributory negligence beyond what was immediately obvious to the jury by arguing the fault of Homer Laughlin. The instruction to the jury that they should not consider the fault of any party not present in the suit was entirely proper.[2]

The issue in this lawsuit was whether Monongahela was negligent; the issue of whether Homer Laughlin was more negligent would merely have confused matters. Monongahela's point that it should have been allowed to argue that the accident was *entirely* the fault of plaintiff and Homer Laughlin and that Monongahela was as blameless as the driven snow is well taken, but the instruction directing the jury not to compare Homer Laughline's negligence with that of the defendant was not error. All of the instructions, taken together, correctly directed the jury to the issue they were properly expected to decide, namely whether Monongahela was negligent.

Finally, in this general area of assigned error, Monongahela next argues that the combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and, (3) West Virginia's statutory workers' compensation immunity violates federal due process and equal protection principles. Appellant makes an ingenious argument here, but cites no clear federal rule beyond the standard cases waxing eloquent in a general way about fairness, due process and equal protection.

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[2] Plaintiff's instruction number 2, given over objection, read as follows:

> You are only to consider the fault of the parties who are currently before the court. You are, therefore, instructed that you may not consider the possible fault of The Homer Laughlin China Company or any other person as a factor in your deliberations as to whether or not the defendant, Monongahela Power Company, is liable to the plaintiff. *Groves v. Compton*, 280 S.E.2d 708 (W.Va. 1981).

In a nutshell, Monongahela's argument is that our decision in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979) abrogated the common law contributory negligence rule so that now a partially negligent plaintiff may recover. However, Monongahela argues, we did not abrogate the pre-*Bradley* rule regarding joint and several liability, particularly that part of the joint and several liability rule which allows a plaintiff to recover the entire judgment from one tortfeasor when the other tortfeasor is either insolvent or protected by statutory immunity. Thus, in a case where: (1) the plaintiff is 10 percent at fault; (2) a third party tortfessor is 1 percent at fault; and, (3) the plaintiff's employer—who is shielded by worker's compensation immunity—is 89 percent at fault, the 10 percent negligent plaintiff recovers all damages from the 1 percent negligent third party tortfeasor. Thus, the power company argues, the system is morally outrageous because under the hypothetical circumstances outlined above, the plaintiff recovers notwithstanding that the plaintiff is ten times more at fault than the third party tortfeasor!

Indeed, this is a spectacularly good argument, but to accept it would require us to turn one hundred years of gradually evolving tort law on its head. As Justice Holmes once said, "The life of the law has not been logic: it has been experience."[3] Although the American tort system may still speak in terms of negligence and fault reminiscent of the 18th century, today the tort system is overlaid with implicit assumptions about spreading the risk of unavoidable accidents. If the federal courts wish to establish national uniformity on personal injury matters by rethinking the whole tort system and making clear, bright line rules of national application, no court would welcome such rules more hospitably than we. But, until such federal rules are articulated by the

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[3] O. W. Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881) p. 1.

Supreme Court of the United States, we shall not presume to anticipate that august body's ruling on the subject.[4] Therefore, notwithstanding the novelty, ingenuity and even logic of Monongahela's argument, we decline to rewrite the entire tort law of West Virginia in one fell swoop based on supposed federal principles without explicit federal direction.

III

The trial court permitted, over objection, the introduction of eight photographs depicting signs on various electric utility substations located in Ohio, West Virginia and Pennsylvania. Each photograph, taken within six months of the trial, depicted an electric utility substation with signs identifying the owner. Plaintiff did not purport to offer the photographs as substantive evidence, but rather for the stated purpose of illustrating his expert's testimony about how such signs might appear. Plaintiff offered no evidence that any of the substations depicted in the photographs had such signs at the time of the accident.

During closing argument, plaintiff's counsel used these photographs as "illustrative" evidence and repeatedly referred to the photographs to suggest that Monongahela Power had a duty to place simlar signs on its substation in February, 1979. Plaintiff's counsel also referred to the testimony of plaintiff and his co-worker, admitted over objection, that they would not have entered the substation had it had signs such as those pictured.

Plaintiff's expert witness, Dr. Bartel, testified that the sign placed upon the substation by Monongahela Power did not meet the requirements of the National Electrical Safety Code. Dr. Bartel further testified that

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[4] *See,* for example, R. Neely, *The Product Liability Mess: How Business Can Be Rescued From State Court Politics,* The Free Press (New York, 1988).

at the time of the plaintiff's accident in February of 1979 a proper sign would have contained both identity of ownership and some indication of the magnitude of the voltage contained in the substation. Thus, the purpose of admitting the photographs about which the defendant now complains was to illustrate Dr. Bartel's testimony and give examples of warning signs that, in Dr. Bartel's opinion, complied with the National Electrical Safety Code as of the date of the plaintiff's accident.

Our general rule is that the admission of photographic evidence is within the sound discretion of the trial court. *Roberts v. Stevens Clinic Hospital, Inc.*, —— W.Va. ——, 345 S.E.2d 791 (1986). Two major issues in this case were what constituted an appropriate warning and whether such warning should have been placed upon the substation to comply with the requirements of the evidence from experts that both industry safety standards and OSHA safety standards required the clear marking of high voltage substations; consequently, we find that the trial court did not abuse his discretion in allowing the photographs to be admitted into evidence. Demonstrative tangible evidence such as photographs can be introduced into evidence as an aid to understanding the witnesses's testimony. *Thrasher v. Amere Gas Utilities Co.*, 138 W.Va. 166, 75 S.E.2d 376 (1953), *appeal dismissed*, 347 U.S. 910 (1954).

IV

During oral argument in this Court, plaintiff's counsel admitted that there were substantial errors in the calculation of the prejudgment interest.[5] Specifically, the

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[5] Defendant also argues that the Court's action in adding interest to the judgment was improper because the motion was not made within ten days of trial under Rule 59(e), *W.Va. R.C.P.* However, in light of our statute, *W.Va. Code* 56-6-31 [1981], requiring the trial court to add prejudgment interest, we find that moving under Rule 60(a) was correct because *the Court's* failure to add interest was an "oversight" on the part of the Court.

plaintiff's expert included a calculation for prejudgment interest in his testimony concerning special damages, but the trial court then added interest to the entire judgment. In effect, then, the trial court gave interest on interest. In addition, the trial court calculated all prejudgment interest at a constant rate of 10 percent from the date of the accident—February 16, 1979—to the date of the verdict—June 23, 1989. However, the award should have been calculated based upon a statutory rate of 6 percent from 16 February 1979 to 5 July 1981, and at a rate of 10 percent thereafter. *See Weimer-Godwin v. Board of Education of County of Upshur*, —— W.Va. ——, 369 S.E.2d 726 (1988); *Bell v. Inland Mutual Ins. Co.*, —— W.Va. ——, 332 S.E.2d 127 (1985), *appeal dismissed and cert. denied*, 474 U.S. 936 (1985).

Because these problems with interest were entirely mechanical, at oral argument the Court requested the parties to enter into a stipulation regarding prejudgment interest. Pursuant to that request, the following stipulation was entered into by the parties:

> Now comes Appellee, Charles R. Miller, by his counsel, and also comes Appellant, Monongahela Power Company, by its counsel, pursuant to the court's supplemental requests and have prepared the following additional stipulations regarding prejudgment interest, based on the assumption that plaintiff is entitled to prejudgment interest on the entire verdict.
>
> 1) That deducting the prejudgment interest to which the plaintiff's economist testified would reduce the verdict amount from $1,200,000 to *$1,108,197.00*.
>
> 2) That reducing $1,108,197.00 by 10% for plaintiff's negligence results in a damages award of *$997,377.30*.
>
> 3) That prejudgment interest at the correct statutory rates on $997,377.30 is *$937,807.92*.

> 4) That the total judgment amount including prejudgment interest on the entire damages award would be *$1,935,185.22.*

Here the error of giving interest on interest appears clearly on the face of the record, and the amount of excess interest can be easily calculated. In such a case, the trial court should have avoided adding interest on interest, particularly because plaintiff's counsel candidly admitted that such a problem existed.

In *Grove v. Myers*, —— W. Va. ——, 382 S.E.2d 536 (1989), we said that prejudgment interest under *W. Va. Code*, 56-6-31 [1981] is recoverable on special or liquidated damages, and that a special interrogatory should be submitted to the jury for it to designate the amount of special or liquidated damages. We placed the burden of submitting a special interrogatory on the defendant when we said, "[w]hen this procedure is not followed and only a general verdict is returned, the plaintiff is entitled to prejudgment interest on the entire verdict containing special or liquidated damages in unspecified amounts." *Id.* at 542.

The approach in *Groves* emerges from Syl. Pt. 3, *Kirk v. Pineville Mobile Homes*, —— W. Va. ——, 310 S.E.2d 210 (1983), which involved fire damage to property, and the incidental annoyance and inconvenience:

> Where a general verdict is returned for loss or damage to real and personal property which includes an amount for loss of use arising from annoyance and inconvenience, the plaintiff is entitled to prejudgment interest on the entire amount of the general verdict unless the jury has by separate finding established an amount for such loss of use.

The rule of Syl. Pt. 3 of *Kirk*, *supra*, is one of narrow application, and the apparent extension in *Grove* of the rule was, thankfully, never made a syllabus point. Thus, we will not, in every case, refrain from sorting out pre-

judgment interest errors. However, our willingness to sort out such errors is entirely a matter of grace when a defendant fails to submit a jury interrogatory on special or liquidated damages and ends up owing prejudgment interest on a general verdict.

We elect to sort the pre-judgment interest problems out in this case because we do not find the errors were invited, and we find no evidence from the defendant contradicting the plaintiff's evidence on special damages which included the interest calculation. However, when defense counsel does something to confuse the issue and then seeks to assign error, or deliberately introduces convoluted and intricate argument about problems that could easily have been cured by a *Groves*' special interrogatory, we will dismiss the assignment summarily.

We did not intend with our statement in *Groves* to create a trap for the unwary defendant and a jackpot for the silent plaintiff. Our job is not to bail careless defense counsel out of problems of their own making, but neither is it to provide a windfall for plaintiffs who sit by and allow the matter of damages and prejudgment interest to become hopelessly confused. Consequently, we would clarify the *Groves* rule here by adding that when the lawyers and the trial court can sort out the parts of a judgment on which interest should be added, even without the special interrogatories, the trial court should do so.

Therefore, for the reasons set forth above, the judgment of the Circuit Court of Hancock County is affirmed in part and reversed in part and the case is remanded to the circuit court with directions to enter judgment in the amount of $1,935,185.22.

Affirmed in part,
reversed in part,
remanded with
directions.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 7th day of February, 1991, the following order was made and entered:

No. 19640

CHARLES R. MILLER, Plaintiff Below,
Appellee

vs.

MONONGAHELA POWER COMPANY, a corporation,
Defendant Below,
Appellant

The Court, having maturely considered the transcript of the record and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the judgment of the Circuit Court of Hancock County, rendered on the 25th day of October, 1989, but not such as to require reversal of the entire judgment. It is therefore considered and ordered that said judgment is affirmed except in the amount of prejudgment interest awarded. And this action is remanded to the Circuit Court of Hancock County with directions to enter judgment in the amount of $1,935,185.22; according to the principles stated in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Hancock County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief Justice Miller and Justices McHugh, Workman and Brotherton.

A True Copy

Attest:

/s/ Ancil G. Ramey
Clerk
Supreme Court of Appeals

APPENDIX C

IN THE CIRCUIT COURT OF HANCOCK COUNTY
WEST VIRGINIA

Civil Action No. 81-C-78Sp

CHARLES R. MILLER,

Plaintiff,

v.

MONONGAHELA POWER COMPANY, a corporation,

Defendant.

JUDGMENT ORDER

This action came on for trial before the Court and a jury, Honorable George L. Spillers presiding, and the issues having been duly tried and the jury having returned its verdict and answers to the interrogatories propounded by the Court on June 23, 1989, a copy of which is attached hereto and incorporated as though fully stated herein, pursuant to which the jury rendered a verdict in favor of the plaintiff, having found the plaintiff to be ten percent (10%) negligent and the defendant to be ninety percent (90%) negligent and the total amount of damages to the plaintiff to be One Million, Two Hundred Thousand Dollars ($1,200,000.00), the plaintiff is entitled to a judgment against the defendant in the amount of One Million, Eighty Thousands Dollars ($1,080,000.00).

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of One Million, Eighty Thousand Dollars ($1,080,000.00) with interest thereon at the rate of ten percent (10%) from the aforesaid date until paid and his costs of action.

ENTERED this 26th day of June, 1989.

/s/ George L. Spillers
Judge

IN THE CIRCUIT COURT OF HANCOCK COUNTY
WEST VIRGINIA

Civil Action No. 81-C-78-Sp

CHARLES R. MILLER,

Plaintiff,

vs.

MONONGAHELA POWER COMPANY,

Defendant.

VERDICT FORM

INTERROGATORY NO. 1: Do you find that defendant Monongahela Power Company was guilty of negligence which was the proximate cause of the plaintiff's injuries?

ANSWER: Yes (Yes or No)

(If your Answer to Interrogatory No. 1 is "No", you need not answer Interrogatories 2, 3 and 4).

INTERROGATORY NO. 2: Do you find that plaintiff Charles R. Miller was guilty of negligence which was a proximate cause of his injuries?

ANSWER: Yes (Yes or No)

INTERROGATORY NO. 3: If you have answered "Yes" to both Interrogatories Nos. 1 and 2, then, using 100% to represent the total negligence of the parties, apportion the negligence between them.

ANSWER: Defendant Monongahela Power Company 90%

Plaintiff Charles R. Miller 10%

TOTAL 100%

INTERROGATORY NO. 4: State the total amount of damages which you find were sustained by plaintiff Charles R. Miller as a result of the occurrence. In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of plaintiff Charles R. Miller.

ANSWER: $1,200,000.00

/s/ John O. Scott
Foreperson

A TRUE COPY
Attest:

/s/ Lois Wilkinson
Clerk
Circuit Court, Hancock County

APPENDIX D

IN THE CIRCUIT COURT OF HANCOCK COUNTY
WEST VIRGINIA

Civil Action No. 81-C-78Sp

CHARLES R. MILLER and CAROL MILLER, his wife,
Plaintiffs,

v.

MONONGAHELA POWER COMPANY, a corporation,
Defendant.

ORDER

On the 21st day of August, 1989, came the plaintiffs, Charles R. Miller and Carol Miller, his wife, by their attorneys, Carl N. Frankovitch, Arthur M. Recht, and Mark A. Colantonio, and as well came the defendant, Monongahela Power Company, by its attorneys, John B. Garden and Jeffrey A. Holmstrand, for hearing on the defendant, Monongahela Power Company's Motion for a New Trial and for Judgment Notwithstanding the Verdict in the above-captioned case. After hearing extensive argument of counsel, the Court was of the opinion that the defendant's Motion for a New Trial and for Judgment Notwithstanding the Verdict should be denied.

Thereupon, defendant, Monongahela Power Company, moved the Court pursuant to West Virginia Rule of Civil Procedure 62 for a stay of execution pending an appeal of this matter to the West Virginia Supreme Court of Appeals and that such stay be granted without providing security.

The Court being of the opinion that the Motion for Stay should be granted, therefore, ORDERED that the defendant's Motion for a New Trial and for Judgment Notwithstanding the Verdict is denied and that the defendant's Motion for Stay Pending Appeal is granted.

All to which the respective objections of the parties are noted.

ENTERED this 22nd day of August, 1989.

/s/ George L. Spillers
Judge

APPENDIX E

IN THE CIRCUIT COURT OF HANCOCK COUNTY
WEST VIRGINIA

Civil Action No. 81-C-78-Sp.

CHARLES R. MILLER,
Plaintiff,

vs.

MONONGAHELA POWER COMPANY, a corporation,
Defendant.

JUDGMENT ORDER NUNC PRO TUNC

This action came on for trial before the Court and a jury, the Honorable George L. Spillers presiding, and the issues having been duly tried and the jury having returned its verdict and answers to the interrogatories propounded by the Court on June 23, 1989, a copy of which is attached hereto and incorporated as though fully stated herein, pursuant to which the jury rendered a verdict in favor of the plaintiff, having found the plaintiff to be ten percent (10%) negligent, the defendant to be ninety percent (90%) negligent, and the total amount of damages to the plaintiff to be One Million, Two Hundred Thousand Dollars ($1,200,000.00), the plaintiff is entitled to a judgment against the defendant in the amount of One Million, Eighty Thousand Dollars $1,080,000.00).

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of One Million, Eighty Thousand Dollars ($1,080,000.00) together with prejudgment interest in the amount of One Million, One Hundred Sixteen Thousand, Seven Hundred Twenty Dollars

($1,116,720.00) and post-judgment interest thereon at a rate of ten percent (10%) from the aforesaid date until paid and his costs of action. To all of which action of the Court the defendant, by counsel does object.

ENTERED this 25th day of October, 1989.

/s/ George L. Spillers
Judge

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of April, 1991, the following order was made and entered:

No. 19640

CHARLES R. MILLER, Plaintiff Below,
Appellee

vs.

MONONGAHELA POWER COMPANY, a corporation,
Defendant Below,
Appellant

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk
Supreme Court of Appeals

APPENDIX G

WEST VIRGINIA CODE § 23-2-6

§ 23-2-6. Exemption of contributing employers from liability.

Any employer subject to this chapter who shall subscribe and pay into the workmen's compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided, shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions of this chapter. The continuation in the service of such employer shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have: Provided, that in case of employers not required by this chapter to subscribe and pay premiums into the workmen's compensation fund, the injured employee has remained in such employer's service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter, or has elected to make direct payments as aforesaid. (1913, c. 10, § 22; 1915, c. 9, § 22; 1919, c. 131, § 22; Code 1923, c. 15P, § 22; 1974, c. 145.)

APPENDIX H

WEST VIRGINIA CODE § 56-6-31

§ 56-6-31. Interest on judgment or decree.

Except where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: Provided, that if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court. Special damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court. The rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law. (Code 1849, c. 177, § 18; Code 1860, c. 177, § 18; Code 1868, c. 131, § 18; 1882, c. 20, § 18; Code 1923, c. 131, § 18; 1981, c. 205.)

Supreme Court, U.S.
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OFFICE OF THE CLERK

(2)

No. 91-146

In the Supreme Court of the United States

October Term, 1991

MONONGAHELA POWER COMPANY,
Petitioner,

v.

CHARLES R. MILLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MEMORANDUM IN OPPOSITION

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I

STATEMENT

This case is the classic example of liability imposed under established state law tort principles. The genesis of this case occurred when the Respondent, Charles Miller, was severely injured when he inadvertently entered an unmarked electrical substation owned by the Petitioner, Monongahela Power Company ("Monongahela Power"), instead of a substation owned and located on property of his employer, Homer Laughlin China Company ("Homer Laughlin"). Testimony at the trial of this matter indicated that Monongahela Power deliberately failed to mark or identify the substation in question and had intentionally induced confusion about the ownership of the substation so as to discourage vandals and others who might be inclined to trespass on Monongahela's property. Petitioner's App. A at 10a. It was the intentionally created confusion as to the ownership of the electrical substation which caused Miller to enter the substation and come in contact with electrical power far in excess of that with which he was prepared to work.

The Complaint filed in this action originally joined the Petitioner, Monongahela Power, on grounds of negligence and strict liability as well as Miller's employer, Homer Laughlin, under West Virginia's deliberate intent exception to Workers' Compensation immunity as set forth in W. Va. Code § 23-2-6. During the nearly eight years in which Monongahela Power and Homer Laughlin were codefendants, Monongahela Power failed to file a cross-claim against its codefendant under any theory which it now asserts for the basis of relief in this Court. On January 5, 1988, without objection and with the express

consent of Monongahela Power, Homer Laughlin was dismissed with prejudice as a party to the action. Respondent's App. 1. At no time prior to Homer Laughlin's dismissal or to this date did Monongahela Power seek indemnity or contribution from Homer Laughlin. Judgment was rendered on the basis of the negligence of Monongahela Power in favor of Charles Miller.

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

The positions now presented by Monongahela Power were never fully raised, expressed, developed or ruled on by the lower courts. This case does not present issues of overriding public importance, and the decisions below are appropriate applications of settled legal principles that do not violate constitutional protections. Accordingly, there is no reason for this Court to exercise its discretionary power of review.

I. The Petitioner Did Not Properly Assert Or Contest The Constitutional Issue It Now Presents To This Court And The Decisions Below Are Not Unconstitutional

While Monongahela Power does not precisely describe the relief to which it claims to be entitled, it complains that it has been unconstitutionally denied the right of contribution from Homer Laughlin, Miller's employer (Petitioner's Brief 22). Monongahela Power has never asserted any claim for contribution and accordingly its right to contribution has not been passed on or denied. Therefore, under West Virginia law, assuming that Monongahela Power has not waived its right to contribution by its consent to the dismissal with prejudice of Homer Laughlin, then Monongahela Power would continue to have the right to assert

such a claim for contribution against Homer Laughlin in a separate proceeding to be commenced in the Circuit Court of Hancock County, West Virginia. *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982). If such a claim for contribution were to be filed and denied, then under the principles that Monongahela Power has set out in their brief, Monongahela Power could seek review by the West Virginia Supreme Court of Appeals and ultimately this Court when the party against whom relief is sought (Homer Laughlin) is properly before the Court. Thus, even if the Question Presented were worthy of consideration by this Court, this case is not a good vehicle for deciding it because Monongahela Power has failed to keep all relevant parties in the case, and there will be no party arguing against allowing indemnification as the proper solution to the purported constitutional conundrum.

Monongahela Power has cited cases from various jurisdictions to purportedly support its claim of constitutional infirmity in the application of the West Virginia Workers' Compensation Statute, e.g, *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985); *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975); *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974). These cases do not support review for several reasons, first, every case cited by Monongahela Power has properly included the third-party claim against the employer. Obviously, since contribution can be had only from the employer in the case sub judice, the employer (Homer Laughlin) must be a party to any such proceeding.

Moreover, only one of the cases which Petitioner cites as supporting its position, *Carlson v. Smogard*, 215

N.W.2d 615 (1974), purports to be controlled by constitutional principles, although the Court there relied on both state and federal constitutional provisions in a most conclusory manner. The other cases cited by Monongahela Power turn on statutory interpretations, *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), *Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969), or contractual and state constitutional provisions, *L.M. Duncan & Sons v. City of Clearwater*, 478 So.2d 816 (Fla. 1985) and *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975).

Contrary to Monongahela Power's assertions, West Virginia's tort and compensation system of joint and several liability and employer immunity is not an idiosyncratic anomaly unique to West Virginia. Similar tort concepts exist throughout American jurisprudence without violating constitutional standards. *Hudson v. Union Carbide Corp.*, 620 F. Supp. 558 (N.D. Ga. 1985); *Raisler v. Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas v. Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 290 N.W.2d 276 (1980).

This Court has considered virtually the same issues as those presented in this action in *Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co.*, 406 U.S. 340 (1972)(per curiam), and *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), where this Court refused to allow third-party tort-feasors to obtain contribution from employers who were covered by the limitation of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950). In *Lockheed Aircraft Corporation v. United States*, 460 U.S.

190 (1983) and in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), cited by the Petitioner, the issue of third-party indemnity was resolved solely on the basis of statutory interpretation to permit the indemnity claims by the third party against the employer. The issue of limiting third-party claims against employers was also before this Court in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) in which the plaintiff was injured when the ejection seat of a jet fighter malfunctioned during flight permanently injuring the pilot. The pilot sued Stencel, the manufacturer of the ejection system, for negligence. Stencel cross-claimed against the United States for indemnity. Stencel claimed it was passively negligent while the government's active negligence caused the injuries. The pilot, like Miller in this action, had received compensation. This Court dismissed Stencel's third-party claims under the limitation of liability provision of *Feres v. United States*, 340 U.S. 135 (1950), which immunizes the United States from a claim asserted by a member of the military, which is essentially identical to the immunity of the employer in the state of West Virginia (Homer Laughlin) from a claim asserted by an employee (Miller).

West Virginia maintains a comprehensive system of Workers' Compensation which includes the balancing of interests of the employee, employer and third parties. Besides granting recovery to employees against non-negligent employers and denying contribution claims grounded in negligence by third parties against employers, the system also provides protection for third-party tortfeasors by precluding employers from recovering Workers' Compensation benefits paid to employees injured by negligent third parties, all as part of the *quid pro quo* in the balancing of the competing interests of the employee,

employer and third parties. *Lockheed, supra*, at 198. *National Fruit Product Co. v. Baltimore & Ohio R.R. Co.*, W. Va. , 329 S.E2d 125 (1985) and *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co.*, 115 F.2d 277, 282 (4th Cir.), *cert. denied*, 312 U.S. 702 (1940). It is imperative to note that both employees and third parties are afforded the identical right to recover from an employer either directly or by contribution, providing the claim is based upon an injury from conduct rising to a standard of deliberate intent. *Sydenstricker*, 288 S.E.2d at 511; W. Va. Code § 23-4-2 (Supp. 1991). Also included within this comprehensive statutory scheme is West Virginia's treatment of the receipt of Workers' Compensation benefits as a collateral source as it relates to third-party tort-feasors. *See Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). Petitioner's argument is merely a veiled attempt to avoid the collateral source rule as established and applied in West Virginia.

In summary, the Court should decline Petitioner's invitation to open up Pandora's Box—really a reopening of substantive due process issues that were settled in the first half of this century—by constitutionalizing the tort system. But even if the Court were to join this opening foray into a constitutional thicket, it should wait for a case in which all parties, including not just the employee and the third party but also the would-be indemnitor, the employer, are before the Court so that there is a concrete controversy involving all the relevant parties, all of whom can thus argue for their respective interests.

II. The Post-Trial Award Of Prejudgment Interest Does Not Violate Monongahela Power's Right To Due Process.

Petitioner had every opportunity to argue against the award of prejudgment interest and to argue concerning the amount, but its argument is that the Due Process Clause regulates the timing during state court litigation when the issue must be raised and decided, by requiring the plaintiff to file a document mentioning prejudgment interest at some time before verdict. In our view, this contention borders on the frivolous.

Petitioner asserts that it has been denied due process because the plaintiff's Complaint did not set forth a demand for prejudgment interest and that it was otherwise not aware that prejudgment interest might be awarded by the Court. Such a claim ignores the fact that under West Virginia law prejudgment interest is mandated by statute pursuant to W. Va. Code § 56-6-31 (1981), whereby every judgment which includes special damages bears interest from the date the cause of action arose. This statutory imposition of prejudgment interest, which has been in effect since 1982, was subject to judicial interpretation in *Grove V. Myers*, ____ W. Va. ____, 382 S.E.2d 536 (1989), which was decided prior to the instant case and which held that the addition of prejudgment interest is a ministerial duty of the Court under W. Va. Code § 56-6-31 (1981), and a defendant must submit special interrogatories which permits the jury to set forth the special damages in their verdict to avoid imposition of interest on the entire amount of the verdict.

Petitioner apparently does not take issue with the statutory construction of W. Va. Code § 56-6-31 (1981) made by the West Virginia Supreme Court of Appeals but claims

that the demand for prejudgment interest must be plead in the Complaint as a matter of constitutional law. Rule 54(c) of the West Virginia Rules of Civil Procedure and Rule 54(c) of the Federal Rules of Civil Procedure are identical. This rule has consistently been held by the West Virginia Supreme Court of Appeals to permit a judgment to include all damages afforded under applicable law, irrespective of whether the relief is specifically demanded in the pleadings. *Berry v. Nationwide Mutual Insurance Co.*, ____ W. Va. ____, 381 S.E.2d 367 (1989); *Bell v. Mutual Insurance Co.*, 332 S.E.2d 127 (W. Va.), *cert. denied*, 474 U.S. 936 (1985); and *Middlewest Concrete Forming & Equipment Co. v. General Insurance Co. of Am.*, 165 W. Va. 280, 267 S.E.2d 742 (1980). This is not a novel interpretation of Rule 54(c) and is consistent with the great weight of authority in the Federal Courts. *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987); *City of West Haven v. Liberty Mutual Insurance Co.*, 639 F. Supp. 1012 (D.Conn. 1986); *Bugher v. Consolidated X-ray Service Corp.*, 705 F.2d 1426 (5th Cir.) *cert. denied*, 473 U.S. 904 (1985).

Petitioner suggests that *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7 (1st Cir. 1987) and *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712-717 (4th Cir.), *cert. denied*, 464 U.S. 848 (1983) are similar. In *Atlantic Purchasers*, however, the plaintiff received an award of compensatory and punitive damages and after the verdict was returned attempted to obtain a trebling of the compensatory award pursuant to the North Carolina Unfair Trade Practices Act. The 4th Circuit held that the plaintiff had elected punitive damages not treble damages pursuant to the statute and that such a fundamental

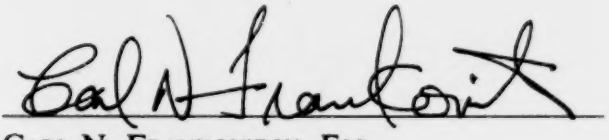
change should not be permitted after the verdict. Additionally, the Court noted that plaintiff in no instance would be entitled to both compensatory damages on the common law theory and the statutory treble damages. There certainly is no separate election of remedies in the case sub judice. In *Cianbro,* 814 F.2d at 7, the Court determined that the principal amounts being sought by the plaintiff were subject to a setoff and there was no principal to which the plaintiff was entitled. Accordingly, a claim for interest and costs of recovery were denied.

Petitioner then argues that it should not have been required to request a special interrogatory to the jury, breaking out special damages, becauses it had no notice that prejudgment interest would be sought. As already noted, this argument ignores the fact that prejudgment interest is mandated by statute in West Virginia and, therefore, advances the proposition that statuory law is to be disregarded unless specifically plead. This is hardly the result intended under Rule 54(c) of both the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure. In no event do these quibbles with West Virginia procedure rise to a constitutional challenge to the payment of prejudgment interest on damage awards in tort actions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX I

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

CHARLES R. MILLER, *Plaintiff,* vs. MONONGAHELA POWER COMPANY, a corporation, and HOMER LAUGHLIN CHINA COMPANY, a corporation, *Defendants.*	**CIVIL ACTION NO. 81-C-78 Sp**

DISMISSAL ORDER

On the 14th day of December, 1987, the plaintiff appeared by his attorneys, Arthur Recht and Carl N. Frankovitch; defendant, Monongahela Power, appeared by its attorney, Scott Blass; and defendant, Homer Laughlin China Company, appeared by its attorney, Raymond A. Hinerman, all pursuant to the Court's Notice of Status Conference on this date.

WHEREUPON, counsel for the plaintiff advised the Court that the plaintiff was willing to have the defendant, the Homer Laughlin China Company, dismissed with prejudice from this cause on the condition that further discovery, to which the plaintiff would otherwise be entitled if the defendant, the Homer Laughlin China Company, remained as a party, would be provided to the plaintiff by and through counsel for the Homer Laughlin China Company. Counsel for Homer Laughlin China Company advised the Court that this was an agreeable condition to

the dismissal as long as it was with prejudice and would be final.

There being no objection thereto and the Court perceiving none, it is accordingly ADJUDGED, ORDERED, and DECREED that the Homer Laughlin China Company is from this day forward dismissed with prejudice as a party defendant in this cause but shall respond to the plaintiff's discovery requests as though the defendant, the Homer Laughlin China Company remained as a party defendant.

Dated this 5th day of January, 1988.

ENTER:

/s/ GEORGE L. SPILLERS
Judge

HAVE SEEN:

/s/ CARL N. FRANKOVITCH, ESQ.
Counsel for Plaintiff

/s/ SCOTT BLASS, ESQ.
Counsel for Defendant,
Monongahela Power

/s/ RAYMOND A. HINERMAN, ESQ.
Counsel for Defendant,
Homer Laughlin China Company

CERTIFICATE OF SERVICE

I, Carl N. Frankovitch, counsel for Respondent, do hereby certify that I have caused three copies of the Memorandum in Opposition to be served on this 21 day of August, 1991, by first-class mail, postage prepaid, on counsel for Petitioner as follows:

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All parties required by the Rules of this Court to be served have been served.

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